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# In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73–696

THE EMPORIUM CAPWELL CO., PETITIONER

*v.*

WESTERN ADDITION COMMUNITY ORGANIZATION, ET AL.

No. 73–830

NATIONAL LABOR RELATIONS BOARD, PETITIONER

*v.*

WESTERN ADDITION COMMUNITY ORGANIZATION, ET AL.

*ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App., pp. 1–53)[1] is reported at 485 F. 2d 917. The decision and order of the National Labor Relations Board (Pet. App., pp. 54–106) are reported at 192 NLRB 173.

[1] "Pet App." refers to the appendix to the petition in No. 73–696.

## JURISDICTION

The judgment of the court of appeals was entered on June 29, 1973. On September 19, 1973, the Chief Justice extended the time for filing the petition for a writ of certiorari in No. 73-696 to and including October 27, 1973, and the petition was filed on that date. Also on September 19, 1973, the Chief Justice extended the time for filing the petition for a writ of certiorari in No. 73-830 to and including November 26, 1973, and the petition was filed on that date. The petitions were granted on February 19, 1974. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether, in the circumstances of this case, it was an unfair labor practice for an employer to discharge employees for engaging in concerted activities designed to force it to bypass the exclusive bargaining representative and bargain directly with them over alleged racially discriminatory employment practices.

## STATUTES INVOLVED

Sections 7, 8 and 9 of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519), 29 U.S.C. 157, 158, and 159, provide in pertinent part as follows:

> Section 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).
>
> Section 8(a). It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; * * *.
>
> Section 8(b). It shall be an unfair labor practice for a labor organization or its agents * * *
>
> (7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees: (A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under section 9(c) of this Act, * * *.
>
> * * * * *
>
> Section 9(a). Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the ex-



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> clusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.
>
> * * * * *

Section 704(a) of the Civil Rights Act of 1964 (78 Stat. 257), 42 U.S.C. 2000e–3(a), provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

## STATEMENT

1. The Emporium Capwell Co. ("the Company") operates a retail department store ("The Emporium") in San Francisco, California (Pet. App., p. 80). Through its membership in the San Francisco Retailer's Council, a multi-employer group, the Company was party to a collective bargaining agreement with the Department Store Employees Union ("the Union") which covered all employees in the stock and marking areas of The Emporium (*ibid.*).



In early April 1968, a group of employees covered by the agreement, including Tom Hawkins and James Joseph Hollins, met with their Union representative, Walter Johnson, to discuss a list of grievances, among which was their belief that the Company was discriminating against members of racial minorities in its employment practices (Pet. App., p. 81; A. 73).[2] Johnson appointed a Union committee to investigate the charges of racial discrimination and then prepared a lengthy report outlining the employees' contentions (Pet. App., p. 82; A. 111–112). Johnson submitted this report to the Retailer's Council, which concluded that the grievances should be taken to the Company (Pet. App., p. 82; A. 74). Accordingly, in mid-April Johnson met with the Company's labor relations manager, who agreed that the Company "would look into" the complaints and "see what [it] could do" (Pet. App., p. 82; A. 74).

In May the group of employees met again with Johnson in order to discuss a particular case of alleged discrimination against a black employee, Russell

[2] Section 21(E) of the collective bargaining agreement expressly prohibited discrimination "in regard to hire, tenure of employment, or job status by reason of race, color, creed, national origin, age, or sex" (Pet. App., p. 80; A. 101). ("A." refers to the separate appendix filed in this Court.)

Young (Pet. App., pp. 82–83; A. 74). But since Young was at that time about to begin his summer vacation, it was agreed that any further investigation should be postponed (*ibid.*).

Johnson and the employees met again at the end of the summer, this time together with representatives from the California Fair Employment Practices Committee ("FEPC") and the local Equal Economic Opportunity Council ("EEOC"). At that meeting, Johnson stated that after considering the employees' charges the Union had concluded that the Company had been engaged in racially discriminatory employment practices and that the Union would therefore pursue the grievance procedures under the collective bargaining agreement, including arbitration if necessary, in order to remedy the alleged discrimination. (Pet. App., pp. 82–83; A. 58, 74–75.)[3] Some of the employees present expressed dissatisfaction with this proposal and requested the Union to picket The Emporium (A. 81–82). Johnson rejected their request on the grounds that picketing would be contrary to the terms of the collective bargaining agreement and that an orderly processing of grievances would have a broader and more "long lasting effect" (Pet. App., pp. 83, 89–90; A. 75–76, 81–82). The FEPC and

[3] Under the agreement, grievances were first presented to an "Adjustment Board," consisting of six members, three from the Company and three from the Union; grievances not resolved by the Adjustment Board could then be submitted to arbitration. It was also agreed that there would be no strike or lockout during the life of the agreement. See Sections 5(B) and 36 of the agreement, set forth at A. 101–103.



EEOC representatives supported Johnson's position (Pet. App., p. 83; A. 75, 82–83).

On the following day, Johnson formally requested a hearing before the Adjustment Board (see note 3, *supra*) to present the grievances which had been discussed at the meeting (Pet. App., p. 83; A. 119). The hearing was held on October 16. The Union representative began presenting evidence by questioning employees regarding their individual grievances, but he was interrupted by employee Hollins, who—acting as spokesman for a group of fellow employees—read a prepared statement objecting to the prosecution of grievances on an individual rather than a group basis. He stated that he and fellow-employees Hawkins, Epps, and Washington would not "speak as individuals" but would act only "as a group" in opposing discrimination (Pet. App., p. 84; A. 25, 27, 60–61). Hollins added that he and his colleagues "wanted to talk to the President of The Emporium and wouldn't talk to anybody else" (Pet. App., p. 84; A. 36), and that their "main purpose was to talk to the President to try to reach an agreement with him to straighten out the problems and conditions of The Emporium" (Pet. App., p. 84; A. 35). Then, after refusing to give testimony regarding individual grievances, the four employees walked out of the meeting (Pet. App., p. 84; A. 25, 59–60). Notwithstanding their failure to testify, as a result of the processing of grievances Young was promoted to the position of First Assistant Manager and another black employee was also promoted to a supervisory position (Pet. App., p. 85; A. 32).

Shortly after the meeting of the Adjustment Board, Hollins asked the Company president, Batchelder, to discuss the question of racially discriminatory employment practices at The Emporium, but Batchelder referred Hollins to the Company's personnel director, Henderson (Pet. App., p. 86; A. 64–65). Hollins refused, however, to take the matter up with Henderson (Pet. App., p. 86; A. 65).

On October 22, Hollins, Hawkins, and several other employees, acting without Union authorization, held a press conference attended by reporters from local newspapers and radio and television stations. The employees claimed that the Company was engaging in racial discrimination, and they announced that they were going to picket The Emporium and institute a consumer boycott to force "the top management" to bargain with them over working conditions (Pet. App., p. 86; A. 9–11, 37, 47–48). Hollins also announced that the picketers would distribute handbills containing the following statement, which he read to the press (Pet. App., pp. 86–87; A. 107):

BEWARE EMPORIUM SHOPPERS
BOYCOTT IS ON ! ! !

> For years at The Emporium black, brown, yellow, and red people, have worked at the lowest jobs, at the lowest levels. Time and again we have seen intelligent hard working brothers and sisters denied promotions and basic respect.
>
> The Emporium is a 20th Century colonial plantation. The brothers and sisters are being treated the same way as our brothers are being treated in the slave mines of South Africa.



> Whenever the racist pig at The Emporium injures or harms a black sister or brother, they injure and insult all black people. The Emporium must pay for these insults. Therefore, we encourage all of our people to take their money out of this racist store, until black people have full employment and are promoted justly throughout The Emporium.
>
> We welcome the support of our brothers and sisters from the churches, unions, sororities, fraternities, social clubs, Afro-American Institute, Black Panther Party, W.A.C.O. and the Poor People's Institute.

* * * * *

On November 2, Hollins, Hawkins, Epps, and Washington, acting without Union authorization, picketed The Emporium throughout the entire business day and distributed copies of the above handbill to shoppers entering and leaving the store (Pet. App., pp. 86–87). The picketing was peaceful and did not block entrances to the store; it was done on a Saturday, outside the picketing employees' own working hours (Pet. App., pp. 87, 94–95). While the picketing was in progress, Johnson once again told Hollins that the only way to resolve the matter was through the grievance and arbitration procedures under the contract, but Hollins reiterated that "the only one they wanted to talk to was Mr. Batchelder" (A. 76).

On November 7, the Company gave Hollins and Hawkins written warnings that if the picketing was repeated they might be discharged (Pet. App., pp. 87–88; A. 14–15, 49–50, 106, 114). Nevertheless, on the following Saturday Hollins and Hawkins again picketed

The Emporium and distributed handbills alleging racist practices and urging a consumer boycott (Pet. App., p. 88; A. 14–15, 49–50, 105). They were discharged on the next workday.[4]

2. Following the discharge of Hollins and Hawkins, the Western Addition Community Organization ("respondent") filed unfair labor practice charges with the National Labor Relations Board under Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), which makes it an unfair labor practice for an employer to interfere with an employee's right, under Section 7 of the Act, to engage in concerted action "for the purpose of collective bargaining or other mutual aid or protection."[5] The Board, adopting the Trial Examiner's findings, conclusions, and recommendations (Pet. App., p. 55), dismissed the charges. The Board reasoned that Section 7 does not protect concerted activities which interfere with the Union's right, under Section 9(a), to act as the exclusive representative "of all the employees in [the] unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment," and found that Hollins and Hawkins had been attempting to force the Company to

[4] Their discharge slips read:

"You are being discharged today. Distribution of 'Boycott Emporium' literature on Saturday, November 9, 1968, in front of The Emporium, 855 Market Street, S.F., pursuant to written warning dated 11/7/68 for similar action on 11/2/68." [Pet. App., pp. 88–89; A. 17–18, 51.]

[5] The charges were filed by respondent on behalf of the discharged employees. Such charges "may be made by any person." 29 C.F.R. 102.9. See *National Labor Relations Board* v. *Indiana & Michigan Electric Co.*, 318 U.S. 9, 17–18.



bypass the Union and "bargain with [them] for the entire group of minority employees" (Pet. App., p. 104) with respect to conditions of employment. In the Board's view, to extend the protection of Section 7 to these concerted activities would "handicap and prejudice the employees' duly designated representative in its efforts to bring about a durable improvement in working conditions among employees belonging to racial minorities, and place on the Employer an unreasonable burden of attempting to placate self-designated representatives of minority groups while abiding by the terms of a valid bargaining agreement and attempting in good faith to meet whatever demands the bargaining representative put forth under that agreement" (Pet. App., pp. 104–105).[6]

3. The court of appeals reversed, holding that Section 7 protects concerted activities directed against racially discriminatory employment practices where the dissident employees first resort to the exclusive bargaining representative and that representative fails to remedy "the discrimination to the *fullest extent possible by the most expedient and efficacious means*"

[6] Two Board members dissented. Member Jenkins expressed (Pet. App., pp. 56–71) the view that Section 7 entitles minority employees to deal directly with their employer concerning alleged racially discriminatory employment practices, even where such bargaining is in derogation of the authority of the exclusive bargaining representative under Section 9(a). Member Brown disagreed (Pet. App., pp. 71–77) with the Board's fundamental finding that Hollins and Hawkins had been attempting to coerce the Company into bargaining directly with them.

(Pet. App., p. 28; emphasis in original).[7] The court believed that this holding was necessary to accommodate the separate policies of the National Labor Relations Act and the Civil Rights Act of 1964. The court reasoned that, since Title VII of the latter Act bars discrimination by labor organizations, there could be no lawful conflict between the aims of the dissident employees and those of the exclusive bargaining representative; moreover, the court apparently construed Section 704(a) of that Act, 42 U.S.C. 2000e–3(a), as precluding "an employer from discharging employees in retaliation for peaceful picketing of the employer's business in protest of allegedly discriminatory racial practices" (Pet. App., p. 20). Since there had been no finding as to whether the Union had been remedying the alleged discrimination to the fullest extent possible by the most expedient and efficacious means, the court remanded the case to the Board for the making of that factual determination.[8]

Judge Wyzanski, dissenting from the remand order, expressed (Pet. App., pp. 31–53) the view that Section 7 protects concerted activities directed against alleged racially discriminatory employment practices irrespective of the efforts which the exclusive bargaining representative is making to remedy such discrimination.

---

[7] However, the court observed (Pet. App., pp. 29–30) that activities which are "disloyal" under *National Labor Relations Board v. Local Union No. 1229* (*Jefferson Standard*), 346 U.S. 464, would remain outside the protection of Section 7.

[8] The Board on remand was also to consider the issue of disloyalty. See note 7, *supra*.



## SUMMARY OF ARGUMENT

The issue in this case is whether Section 7 of the National Labor Relations Act, interpreted in light of Title VII of the Civil Rights Act of 1964, sanctions concerted activities by dissident employees designed to force their employer to bypass their exclusive bargaining representative and bargain directly with them over alleged racially discriminatory employment practices.

It is well established that Section 7 does not protect concerted activities of that nature where the proposed subject for separate bargaining does not relate to racial discrimination, for such bargaining derogates from the authority of the exclusive bargaining agent under Section 9 of the Labor Act. This consideration is equally forceful when the proposed bargaining subject relates to racial discrimination. Otherwise, where the dissident employees and the exclusive bargaining representative disagree as to whether the employer is engaged in discrimination, the employer would be placed in an untenable position between them. And even where the dissidents and the bargaining representative agree on that issue, they may disagree over the appropriate remedies for the alleged discrimination; settlements between the employer and the dissident employees would almost inevitably be at the expense of other employees and thereby cause strife, disagreement, and disruption within the bargaining unit. Furthermore, to permit separate bargaining by dissidents could lead to fragmentation of the bargaining unit, as each racial or other protected group,

and competing factions within each group, insists upon being recognized for the purpose. Such fragmentation would frustrate the Labor Act's objective of industrial peace and result in the very pitting of one group of employees against another that the majoritarian principle of the Act was intended to avoid.

Separate bargaining is not necessary for effective redress of employment discrimination. Aggrieved employees frequently have adequate remedies under a nondiscrimination provision in their collective bargaining agreement, and they are also protected by the exclusive bargaining representative's duty of fair representation. Moreover, Title VII itself provides a comprehensive set of remedies.

Nothing in Title VII requires a special Section 7 standard authorizing separate bargaining by or on behalf of racial minorities; in enacting Title VII, Congress did not intend to affect existing rights and obligations under the Labor Act or to sanction concerted activities that derogate from the bargaining authority of the majority representative. Moreover, a special standard for alleged discrimination cases would entail administrative and judicial second-guessing of a kind that would place all parties in the position of not being able reasonably to determine their rights prospectively. This is especially true of the standard devised by the court below, which would require an *ex post* determination of whether the majority representative "was actually remedying the discrimination to the fullest extent possible by the most expedient and efficacious means."



In any event, there is no reason for sanctioning the concerted activities in this case. The collective bargaining agreement contained both a nondiscrimination clause and provision for processing grievances through arbitration, and the majority representative was engaged in a good faith effort to process grievances relating to alleged discrimination. The concerted activities interfered with that effort. Moreover, those activities themselves constituted an unfair labor practice under Section 8(b)(7)(A) of the Labor Act, and Title VII was not meant to sanction violations of that Act.

## ARGUMENT

### IT WAS NOT AN UNFAIR LABOR PRACTICE FOR THE COMPANY TO DISCHARGE HOLLINS AND HAWKINS FOR ENGAGING IN CONCERTED ACTIVITIES DESIGNED TO FORCE IT TO BYPASS THE EXCLUSIVE BARGAINING REPRESENTATIVE AND BARGAIN DIRECTLY WITH THEM OVER ALLEGED RACIALLY DISCRIMINATORY EMPLOYMENT PRACTICES

The complaint filed with the Board alleged that the Company's discharge of Hollins and Hawkins was an unfair labor practice under Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1). That provision makes it unlawful "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7 of the Act]." In turn, Section 7 grants employees the right, *inter alia*, "to engage in * * * concerted activities for the purpose of collective bargaining or other mutual aid or protection." Thus the question here is whether the con-

certed activities of the dissident employees were protected by Section 7.

In considering this question, the court of appeals gave great weight to Section 704(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e–3(a), which makes it "an unlawful employment practice for an employer to discriminate against any of his employees * * * because he has opposed any practice made an unlawful employment practice * * *." However, as the court realized, the dissident employees here did more than simply demonstrate in opposition to alleged employment discrimination. They were involved in more than mere protest activity or the presentation of grievances. The Board expressly found that "this was no mere presentation of a grievance, but nothing short of a demand that the [Company] bargain with the picketing employees for the entire group of minority employees" (Pet. App., pp. 103–104), and this finding was sustained by the court of appeals (Pet. App., p. 24, n. 34). Even the dissenting judge below noted that "[t]here could not be a plainer instance of an attempt to bargain respecting working conditions, as distinguished from an adjustment of grievances" (Pet. App., p. 43).

Because economic coercion directed toward forcing an employer to bargain directly with dissident employees contravenes important federal labor law policies (see pp. 17–26, *infra*), the court properly refused to hold that Section 704(a), standing alone, barred the discharge of the employees in this case.[9] However, the

[9] Thus the court's holding would sustain the discharge of the dissident employees if it is shown that the Union was "remedying the [alleged racial] discrimination to the fullest extent possible by the most expedient and efficacious means" (Pet. App., p. 28; italics deleted), or if their activities were "disloyal" under the *Jefferson Standard test* (see note 7, *supra*).



court concluded that the general policies embodied in Section 704(a) and the other provisions of Title VII of the Civil Rights Act of 1964 require that concerted activities engaged in for the ultimate purpose of vindicating Title VII rights be granted special protection under Section 7 of the National Labor Relations Act. We disagree with that conclusion in the circumstances of this case for, as we shall show, the extension of Section 7 protection to the kind of concerted activities involved here would seriously disrupt the orderly process of collective bargaining under the National Labor Relations Act without significantly advancing the goals of Title VII of the Civil Rights Act of 1964.

### A. PROTECTION OF CONCERTED ACTIVITIES DESIGNED TO FORCE AN EMPLOYER TO BARGAIN SEPARATELY WITH DISSIDENT EMPLOYEES WOULD SERIOUSLY DISRUPT THE ORDERLY PROCESS OF COLLECTIVE BARGAINING

#### 1. *The scope of the protection afforded by Section 7 is circumscribed and limited by the authority of the exclusive bargaining representative under Section 9(a).*

Section 9(a) of the Act provides that the "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment." The legis-

lative history of this provision makes clear that Congress, in order to promote orderly collective bargaining and thereby to preserve industrial peace, intended to vest in the employees' chosen representative full power and responsibility to represent all employees, including dissident or splinter groups, and also, as a necessary corollary, to preclude the employer from bargaining with such groups. See *Legislative History of the National Labor Relations Act, 1935,* pp. 1313 (vol. I), 2313, 2974–2975 (vol. II) (G.P.O., 1949). See generally Weyand, *Majority Rule in Collective Bargaining,* 45 Colum. L. Rev. 556 (1945).

This Court has consistently recognized and given content to Section 9(a)'s principle of majority rule. Shortly after passage of the Act the Court determined that "it is a violation of the essential principle of collective bargaining and an infringement of the Act for the employer to disregard the bargaining representative by negotiating with individual employees, whether a majority or a minority, with respect to wages, hours, and working conditions." *Medo Corp.* v. *National Labor Relations Board,* 321 U.S. 678, 684. See, also, *J. I. Case Co.* v. *National Labor Relations Board,* 321 U.S. 332; *Ford Motor Co.* v. *Huffman,* 345 U.S. 330. And in *National Labor Relations Board* v. *Allis-Chalmers Mfg. Co.,* 388 U.S. 175, 180, the Court summarized the majoritarian principle of the Act as follows:

> National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions. *The policy therefore extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees.* [Emphasis added.]



For these reasons, it has long been recognized that the scope of protection afforded to minority activity by Section 7 is circumscribed and limited by the authority of the exclusive bargaining representative under Section 9(a). *Plasti-Line, Inc.* v. *National Labor Relations Board,* 278 F. 2d 482 (C.A. 6); *National Labor Relations Board* v. *Draper Corp.,* 145 F. 2d 199 (C.A. 4).[10] And, specifically, it has been recognized that Section 7 does not protect concerted activities designed to force an employer to bypass the majority representative and bargain directly with dissident employees over conditions of employment. See *National Labor Relations Board* v. *Tanner Motor Livery, Ltd.,* 419 F. 2d 216 (C.A. 9).

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[10] See, also, *Food Fair Stores, Inc.* v. *National Labor Relations Board,* 491 F. 2d 388 (C.A. 3); *Lee A. Consaul Co.* v. *National Labor Relations Board,* 469 F. 2d 84 (C.A. 9); *National Labor Relations Board* v. *Sunbeam Lighting Co., Inc.,* 318 F. 2d 661 (C.A. 7); *National Labor Relations Board* v. *Sunset Minerals, Inc.,* 211 F. 2d 224 (C.A. 9); *Harnishchfeger Corp.* v. *National Labor Relations Board,* 207 F. 2d 575 (C.A. 7). In *National Labor Relations Board* v. *R. C. Can Co.,* 328 F. 2d 974, 979, the Fifth Circuit held that a minority strike during initial contract negotiations is protected by Section 7 if "it seeks to generate support for and an acceptance of the demands put forth by the union, * * * so long, of course, as the means used do not involve a disagreement with, repudiation

*2. Separate bargaining between the employer and dissident employees over alleged racially discriminatory employment practices derogates from the authority of the exclusive bargaining representative.*

The court of appeals recognized that Section 7 does not normally protect concerted activities designed to force an employer into separate bargaining with dissident employees. However, the court concluded that the policies embodied in Title VII of the Civil Rights Act of 1964 require a different result when the object of the proposed separate bargaining is the elimination of alleged racially discriminatory employment practices.[11] The court reasoned that, since Title VII requires labor organizations to oppose racial discrimination, there could be no lawful conflict between the aims of the dissident employees and those of the exclusive bargaining representative, and therefore that the actions of the dissidents were unlikely to derogate from the authority of the majority representative.

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or criticism of, a policy or decision previously taken by the union such as, for example, a no strike pledge, a cooling off period, or the like during negotiation." However, that court has subsequently stated that *R. C. Can* is "of doubtful viability." *National Labor Relations Board* v. *Shop Rite Foods, Inc.*, 430 F. 2d 786, 791. Relying on *National Labor Relations Board* v. *Allis-Chalmers Mfg. Co.*, *supra*, the court in *Shop Rite* held that a non-sanctioned walkout during initial contract negotiations was unprotected by Section 7 because "the national labor policy 'extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees.'" 430 F. 2d at 789.

[11] The Board had not found that the Company's employment practices were racially discriminatory (Pet. App., p. 55, n. 2), and the court of appeals made no finding on that question.



In so holding, the court of appeals seriously underestimated the potential interference with the collective bargaining process which could result from such separate bargaining. First, the court ignored the possibility that in many cases the majority representative, acting in good faith, may disagree with the dissident employees' allegations of racial discrimination. Such a disagreement would pose a serious dilemma. "Sanctioning minority activity [in such circumstances] would decrease union effectiveness by decreasing union prestige and by preventing the bargaining unit from maintaining a united front in its negotiation with management; there would seem to be no compelling reason to sanction this disruption of the NLRA scheme where there is no discrimination." Recent Cases, 87 Harv. L. Rev. 656, 661 (1974). One way to avoid this problem would be to protect the activities of such dissident employees only where racially discriminatory employment practices are subsequently proved. But this solution would pose numerous difficulties of its own. Neither the employer, the majority representative, nor the dissident employees could determine their respective rights prospectively under such a scheme. In particular, the employer would be placed in the position of running a serious risk of committing an unfair labor practice no matter what he did to resolve the situation: taking reprisals against the dissident employees would violate Section 8(a)(1) if their activities were subsequently held to be protected; but bargaining with the dissidents would violate Section 8(a)(5) if their activities were unpro-

tected. Thus any scheme resting on retrospective determination of rights would tend to encourage inaction by the employer which might in turn lead to strikes or other industrial strife. Moreover, such a scheme would require the Board to make findings of fact concerning the existence of discrimination and to develop standards for determining the scope of Title VII protections, tasks for which it is not ideally suited.

Nor would these problems all be eliminated by according Section 7 protection only in those cases where the majority representative and the dissenting employees agree that the employer's practices are discriminatory. Even if, as in this case, the majority representative and the dissident employees agree that discriminatory practices exist and must be eradicated, the possibilities are legion for conflict between them, and for consequent disruption of the orderly process of collective bargaining:

> * * * [D]isputes over tactics and timing can be as disruptive as disputes over goals. Moreover, Title VII does not specify the remedies that are required or appropriate to redress past wrongs. It is thus legally possible for the union and the dissidents to take different positions on the use of quotas, seniority systems, training programs and other forms of affirmative action. Such conflict over remedies could significantly disrupt collective bargaining when * * * the employer is forced to negotiate with both the minority and the union. [Recent Cases, *supra*, 87 Harv. L. Rev. at 661–662; footnotes omitted.]



The employer would be caught between the conflicting bargaining representatives in a manner Section 9(a) was intended to preclude.

If the majority representative and the dissident employees disagree over the appropriate remedies for discrimination, concessions made by the employer to the dissidents would be especially likely to contain the seeds of further divisiveness. As this Court has recognized, "advantages to individuals may prove as disruptive of industrial peace as disadvantages." *J. I. Case Co.* v. *National Labor Relations Board,* 321 U.S. 332, 338. A special concession made or benefit granted to an individual or a dissident group "creates the suspicion of being paid at the long-range expense of the group as a whole." *Id.,* at 338–339.

Indeed, any settlement concerning working conditions which might result from separate bargaining between the employer and the dissident employees would be likely to differ, in specific content, from the particular solutions which the majority representative would advocate. Such a settlement would disturb preexisting arrangements which had been agreed upon by the employer and the majority representative, and in many cases would adversely affect the interests of at least some of the employees not represented by the dissidents. As Judge Wyzanski pointed out in his dissenting opinion below, "[w]hether Hollins and Hawkins had as ultimate goals affirmative quotas for blacks, or some [other] method of achieving * * * a

[desired] racial balance * * *, it is no secret that what was here sought would be in derogation of the union * * * and many of its members" (Pet. App., p. 44). Thus separate bargaining by dissidents, perhaps especially where successful, is likely to cause strife, disagreement, and disruption within the bargaining unit.

3. *Separate bargaining over alleged discrimination would tend to bring about further fragmentation of the bargaining unit.*

To permit dissident groups to bargain separately with their employers over alleged discrimination would work a substantial erosion of the principle of majority rule. For example, if the Company had bargained with Hollins and Hawkins over alleged racially discriminatory employment practices and had reached an agreement with them on changes in working conditions to remedy such discrimination, that would by no means necessarily be the end of the separate bargaining sanctioned by the decision below. Although Hollins and Hawkins, who are black, purported to represent all "black, brown, yellow and red [employees]" (A. 11), there is no evidence that all those employees, or even a majority of the black employees, were willing to accept Hollins and Hawkins as their bargaining representatives on racial matters. And each racial minority might well insist upon its own bargaining representative. But this result—representation along racial lines—would itself violate Section 703(c)(2) of the Civil Rights Act of 1964, which makes it unlawful for a labor organization "to limit, segregate, or classify its membership * * * [on the



basis of] race, color [etc.]." And see *Hughes Tool Co.*, 147 NLRB 1573; *Pioneer Bus Co.*, 140 NLRB 54.

Moreover, fragmentation of the bargaining unit would not logically stop at racial lines; it is possible that conflicting groups would develop within a particular racial minority, and that each would claim to represent that minority and demand that the employer bargain separately with it. "Furthermore, since [the decision below] relies heavily on the federal policy against employment discrimination and since Title VII prohibits discrimination on the basis of sex, religion, and national origin as well as on the basis of race, competing groups protesting nonracial discrimination may also be protected, further undermining the exclusivity principle." Recent Cases, *supra*, 87 Harv. L. Rev. at 662; footnote omitted.

Such fragmentation of the bargaining unit would be unfair to the employer, who would be caught between conflicting demands and forced to determine who is represented by whom. It would also weaken the majority representative's status as an effective bargaining agent, for industrial experience has shown that a labor organization retains significant bargaining leverage only so long as the employer knows that it speaks for all the employees in the bargaining unit that it represents. And it is by no means clear that separate bargaining by conflicting minority factions would provide an effective means of remedying discriminatory practices. What is clear, however, is that such splinter-group bargaining would frustrate the National Labor Relations Act's objective of industrial

peace and lead to the very pitting of one group of employees against another which the majoritarian principle of Section 9(a) was intended to avoid.

### B. FEDERAL LAW PROVIDES OTHER REMEDIES FOR EMPLOYMENT DISCRIMINATION

#### 1. *Contractural and statutory remedies for racial discrimination are afforded under federal labor law.*

In cases, such as this, where the collective bargaining agreement expressly bars racial discrimination, an employee may seek relief against alleged racially discriminatory employment practices by invoking the grievance procedures provided by the agreement. This is an orderly and expeditious method of securing consideration of a claim of discrimination; in many cases it will afford prompt and full relief; and it is more consonant with the general scheme of collective bargaining established by the National Labor Relations Act than are the self-help remedies resorted to by the dissident employees here. Cf. *Gateway Coal Co.* v. *United Mine Workers of America,* No. 72–782, decided January 8, 1974. Furthermore, unsuccessful prosecution of a grievance does not jeopardize pursuit of Title VII remedies. *Alexander* v. *Gardner-Denver Co.,* No. 72–5847, decided February 19, 1974.

Should the majority representative refuse, for inadequate reasons, to process a grievance relating to discriminatory practices, it may be in breach of its duty of fair representation, which this Court has fashioned "as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor



law." *Vaca* v. *Sipes,* 386 U.S. 171, 182. That duty requires a labor organization to represent fairly the interests of all employees for whom it is the exclusive bargaining representative. See, *e.g., Steele* v. *Louisville & N.R. Co.,* 323 U.S. 192. Breach of that duty would subject the labor organization to either a suit for damages (*Vaca* v. *Sipes, supra*) or an unfair labor practice charge under Section 8(b)(1)(A) of the Act. See, *e.g., Local Union No. 12, United Rubber, C., L. & P. Wkrs.* v. *National Labor Relations Board,* 368 F. 2d 12 (C.A. 5), certiorari denied, 389 U.S. 837. Title VII remedies against the union might also be available.

Finally, an employer may in certain circumstances commit an unfair labor practice by failing to eradicate racially discriminatory employment practices. See *Farmers' Cooperative Compress,* 169 NLRB 290, 295–298, enforced and remanded, 416 F. 2d 1126 (C.A.D.C.), certiorari denied, 396 U.S. 903. See also, *Tipler* v. *E.I. duPont deNemours & Co.,* 443 F. 2d 125, 129 (C.A. 6).

#### 2. *Title VII remedies are available to dissident employees.*

Title VII of the Civil Rights Act of 1964 was enacted by Congress "to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin." *Alexander* v. *Gardner-Denver Co., supra,* slip op. at 7. Title VII both creates statutory rights against invidious discrimination and establishes a comprehensive scheme for the vindication of those rights. The dissident employees' proper recourse under Title VII was to bring charges

of unfair employment practices first to their State or local equal employment agency and, if no relief was secured at that level, then to the Equal Employment Opportunity Commission. The Commission is vested with the "authority to investigate individual charges of discrimination, to promote voluntary compliance with the requirements of Title VII, and to institute civil actions against employers or unions named in a discrimination charge." *Ibid.*

Nothing prevented the dissident employees here from directly pursuing these Title VII remedies. And whether or not the Commission agreed with their claims of discrimination, they would be entitled, after opportunity for the Commission to act, to sue for enforcement of their Title VII rights. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792. Moreover, Title VII provides that a court may appoint counsel for plaintiffs alleging discrimination, "authorize the commencement of the action without the payment of fees, costs, or security," and grant attorneys' fees in meritorious cases. 42 U.S.C. 2000e–5(e) and (k). And "courts have been given broad discretion to frame appropriate relief and may award damages or order affirmative action on an individual or class-wide basis." Recent Cases, *supra*, 87 Harv. L. Rev. at 665. See generally Note, *Developments in the Law-Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1218–1222 (1971). Both the employer and the labor organization can be required to give effect to such a remedial order. See *United States* v. *Local 189, United Papermakers & Paperworkers*, 282 F. Supp. 39 (E.D. La.), affirmed, 416 F. 2d 980 (C.A. 5), certiorari denied, 397 U.S. 919.



### C. TITLE VII DOES NOT AUTHORIZE SEPARATE BARGAINING BY OR ON BEHALF OF RACIAL OR OTHER DISADVANTAGED MINORITIES, OR PICKETING IN SUPPORT OF SUCH A SEPARATE BARGAINING DEMAND

We have shown above that the extension of special Section 7 protection for concerted activities engaged in to force an employer into a separate bargaining relationship with dissident employees would pervasively disturb the settled federal labor law principle of majority rule and seriously disrupt the scheme established by Congress for the orderly conduct of collective bargaining and that such an extension of Section 7 protection is not necessary to the full effectuation of the rights guaranteed by Title VII. It is also clear that no congressional purpose to modify the collective bargaining rights established under the National Labor Relations Act can be inferred from the enactment of Title VII. During the Senate debate on the Civil Rights Act of 1964, Senator Clark, one of the sponsors of the Act, affirmatively subscribed to the Justice Department position that "[n]othing in Title VII or anywhere else in this bill affects rights and obligations under the NLRA" and explained that Title VII "would not affect the present operation of any part of the NLRA." U.S. Equal Employment Opportunity Commission, *Legislative History of Titles VII and XI of Civil Rights Act of 1964*, pp. 3244–3245. For these reasons, we believe that the general

policies embodied in Title VII should not be interpreted to require protection of dissident bargaining activities under Section 7.

The same considerations also persuade us that Section 704(a) in Title VII should not be read as protecting concerted activities that are contrary to the policies of the National Labor Relations Act and traditionally have fallen outside the protection of Section 7 of that Act. The basic purpose of Section 704(a) is "to protect the employee who utilizes the tools provided by Congress to protect his rights." *Pettway* v. *American Cast Iron Pipe Co.*, 411 F. 2d 998, 1005 (C.A. 5). As previously explained, the "tools provided by Congress" in Title VII do not include a right of separate collective bargaining by dissidents with their employer. Instead, these tools consist of filing a charge with the Equal Employment Opportunity Commission and, if that proves unavailing, bringing a court suit. While the protection of Section 704(a) is not limited to the employee who has filed charges, Title VII, unlike the National Labor Relations Act, does not contain any provision expressly protecting picketing and other concerted activity. Accordingly, we believe that Section 704(a) was not intended to, and does not, protect picketing and related activity which is conducted for a purpose other than to support Title VII remedies and which is contrary to the policies of, and thus unprotected by, the National Labor Relations Act. Therefore, since the picketing here was conducted for the specific purpose of forcing the employer to bargain separately with dissident employees, in derogation of the bargaining authority of the majority representative, it was not sanctioned by Section 704(a).



Our conclusion that neither the general policies nor the particular provisions of Title VII require that dissident employees be permitted to bypass the majority representative and bargain directly with their employers concerning alleged discriminatory practices draws further support from the inherent difficulties of attempting to devise a fair and workable standard under which separate bargaining could be permitted. It would, as previously explained, work an intolerable interference with the collective bargaining scheme under the Act to grant dissident employees an unrestricted right to coerce their employer into bargaining with them separately.[12] And a special standard such as that adopted by the court below, which would

[12] The dissenting judge below contended that employees belonging to racial minorities do possess such an unrestricted right. He justified the interference with normal bargaining relationships that such a right would entail by observing that "[t]o to leave non-whites at the mercy of whites in the presentation of non-white claims which are admittedly adverse to the whites would be a mockery of democracy" (Pet. App., p. 50). But it is because of such considerations that this Court fashioned the duty of fair representation. See pp. 26–27, *supra*. It should not be irrebuttably presumed that that duty will inevitably be breached. There is no "mockery of democracy" where that duty is fulfilled; and breach of the duty is actionable. *Vaca* v. *Sipes*, *supra*. Furthermore, Section 8(b)(1)(A) of the Act prohibits invidious discrimination by the majority representative. *Local Union No. 12, United Rubber, C., L. & P. Wkrs.* v. *National Labor Relations Board*, *supra*. Thus there is no warrant for assuming that minority employees, to be adequately represented, require an unrestricted right to bargain separately with their employer.

grant that right in some cases but not in others, would require administrative and judicial second-guessing of a kind that would place all parties, and especially the employer, in the untenable position of neither knowing nor having any reasonable means of determining their rights prospectively.

For example, under the decision below, the Board would be required to determine in each case whether the majority bargaining representative "was actually remedying the discrimination to the fullest extent possible by the most expedient and efficacious means" (Pet. App., p. 28).[13] But it is not reasonably possible to determine what are "the most expedient and efficacious means" for inducing an employer to abandon discriminatory practices. What works well in some circumstances may not in others. The judgments which the labor organization must make—*e.g.*, whether to file individual grievances or negotiate on a broader basis, whether to press for long-range affirmative action programs or for immediate and specific remedies for current inequalities—will in many cases be of a delicate and sensitive nature and require a close understanding of the personalities involved. Cf. *Vaca* v. *Sipes*, *supra*, 386 U.S. at 191–195. Thus a union could in good faith determine that if it could successfully process grievances in a few strong cases of

[13] This test apparently presupposes that both the majority representative and the dissident employees share a good faith, reasonable belief that discrimination exists. We have previously discussed some of the problems that might arise when the majority representative in good faith concludes that there is no discrimination (see pp. 21–22, *supra*).



discrimination, it would then be in a better position to negotiate with the employer on a broader scale; similarly, a union could reasonably decide to delay negotiations until an existing contract expired, on the ground that the chances of reaching agreement to a broad solution would be greater when the union was free to strike to support its demands. The making of such judgments is at the heart of the discretion vested by the Act in the bargaining representative, and the correctness of such judgments, while perhaps an appropriate issue in a union election campaign, is not readily susceptible of administrative or judicial evaluation. Yet the decision below would force the Board to second-guess the union's strategy after the fact, with no standard other than that provided by hindsight.

Not only would the Board thus be thrust into the inappropriate role of making the kind of judgments that the Act leaves to the discretion of the parties in the bargaining process, but the test itself is unworkably vague and would not afford any of the parties adequate prospective guidance. In particular, it would pose a serious dilemma for the employer, who would not be in a position fully to evaluate whether the labor organization had been pursuing a course of action which the Board or a reviewing court might regard as most efficacious under the circumstances; as we pointed out above in a slightly different context (pp. 21–22, *supra*), the employer would be unfairly caught between the opposing policies of Section 8(a)(1) and Section 8(a)(5).

Moreover, if the union is to carry out its obligation fairly to represent all of the employees in the bargaining unit, it must have latitude to select a course of action which will remedy the discrimination without unduly harming the employees who have not been subjected to discrimination. Cf. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430–431. The test enunciated by the court of appeals would substantially curtail the "wide range of reasonableness [that] must be allowed a statutory bargaining representative in serving the unit it represents." *Ford Motor Co.* v. *Huffman, supra,* 345 U.S. at 338.[14]

D. IN ANY EVENT THE CONCERTED ACTIVITIES IN SUPPORT OF THE DEMAND FOR SEPARATE BARGAINING IN THIS CASE SHOULD NOT BE SANCTIONED

1. *Protection of the concerted activities here would frustrate the purposes of both Acts.*

The dissident employees here were seeking to force the Company to bargain over alleged racially discriminatory employment practices. But discrimination had already been the subject of bargaining between the

[14] Some of the considerations outlined above may suggest the possibility that separate bargaining over alleged discrimination should be permitted as a remedy for an adjudicated breach of the labor organization's duty of fair representation. Cf. *National Labor Relations Board* v. *Tanner Motor Livery, Ltd., supra,* 419 F. 2d 216; *National Labor Relations Board* v. *Mansion House Center Management Corp.*, 473 F. 2d 471 (C.A. 8). Since there has been no such adjudication here—to the contrary, the Board expressly stated that there was no evidence of a breach of the duty of fair representation (Pet. App., p. 55, n. 2)—that issue is not raised in this case. We note, however, that the prior adjudication of a breach of duty would afford a prospective clarification of the respective rights of the parties.



Company and the Union, and as a result the Company had expressly agreed not to discriminate "in regard to hire, tenure of employment, or job status by reason of race, color, creed, national origin, age, or sex" (Pet. App., p. 80; A. 101). Although this broadly phrased promise did not speak to specific instances of discrimination or provide specific remedies, the Company further agreed to a grievance procedure, including binding arbitration, for the enforcement of this and other contractual undertakings. Both the Company and the Union reasonably anticipated that, during the life of the collective bargaining agreement, specific complaints concerning alleged discrimination could be satisfactorily handled through this grievance procedure. Experience in handling specific grievances could, of course, provide a basis for bargaining over more detailed contractual provisions with respect to discrimination when the time came for re-negotiation of the agreement.

The grievance procedure was open to the dissident employees here. Moreover, pursuing that procedure would not have been a mere empty exercise; the Board found that "[a]ll the evidence indicates that the Union * * * was endeavoring in every way available to it under the agreement to adjust any and all cases of racial discrimination brought to its attention, and in at least one and apparently two cases had brought about the desired adjustment" (Pet. App., p. 103). Nevertheless, the dissidents refused to pursue their remedies under the collective bargaining agreement; instead, acting without Union authorization, they engaged in concerted activities to force the Company to

deal directly with them as representatives of all minority employees.

We submit that, at a minimum, when the collective bargaining agreement expressly bars discrimination and the majority representative is making a good faith effort to process grievances relating to alleged discrimination, dissident employees should not be permitted to bypass the grievance procedure and engage in unauthorized concerted activities for the purpose of forcing their employer into a direct bargaining relationship with them. Such activities, as we have shown above, interfere with the scheme established by the Act for orderly collective bargaining and are unnecessary to a full effectuation of Title VII rights.

Indeed, the concerted activities here interfered with, rather than furthered, the Union's good faith efforts to remedy the alleged discrimination. The dissident employees refused to cooperate with the Union and insisted upon negotiating separately with the Company. In doing so, they hampered the Union in its pursuit of contractual grievance procedures on behalf of themselves and other minority employees. The Board found that the Union "was prepared to resort to arbitration to enforce its position that racial discrimination in conditions of employment existed in [The Emporium], and was handicapped in proceeding by the the four employees' refusal to assist * * * the Union * * *" (Pet. App., p. 103).[15] The court

[15] The Union's attorney advised it that in the absence of the dissidents' testimony, which they refused to give, it would be impractical to proceed to arbitration on any of the grievances (A. 76).



of appeals sustained this finding, stating that "[i]n abandoning the grievance procedures and seeking to bargain on their own, the picketers here rendered essentially ineffective the method of remedying grievances chosen by their collective bargaining representative and provided by the collective bargaining agreement" (Pet. App., p. 24). The policies embodied in Title VII surely do not require protection of concerted activities, like these, which directly frustrate efforts to remedy employment discrimination.

2. *A holding that the dissident employees' activities here were protected by Section 7 would be inconsistent with Section 8(b)(7)(A) of the National Labor Relations Act.*

Section 8(b)(7)(A) of the Act makes it an unfair labor practice for a "labor organization * * * to picket * * * any employer where an object thereof is forcing or requiring an employer to recognize or bargain with [it] as the representative of his employees * * * where the employer has lawfully recognized * * * [another] labor organization." When Hollins, Hawkins, and the other picketers joined together for the purpose of making a collective demand on the Company with respect to working conditions, they constituted a "labor organization" under Section 2(5) of the Act.[16] This is true even though their internal organization was loose, unstructured, and informal. See, *e.g.*, *National Labor Relations Board* v.

[16] That provision defines "labor organization" as "any organization * * * in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, * * * or conditions of work."

*Cabot Carbon Co.*, 360 U.S. 203; *Utrad Corp.* v. *National Labor Relations Board*, 454 F. 2d 520 (C.A. 7); *National Labor Relations Board* v. *Kennametal, Inc.*, 182 F. 2d 817 (C.A. 3). The object of the dissident employees was to coerce the Company to bargain with them concerning conditions of employment (see pp. 7–8, 10–11, 16, *supra*),[17] and they chose picketing as one of the economic weapons with which to achieve that end. It is undisputed that the Company had already lawfully recognized another labor organization as the exclusive bargaining representative for its stock and marking employees.[18] Thus the picketing here fell within the literal proscription of Section 8(b)(7)(A).

Moreover, such a violation of Section 8(b)(7)(A) is no mere technical violation, "for one of the objectives of [that provision] is to protect an employer from being 'caught between' two labor organizations, whether or not they are rivals." Recent Cases, *supra*,

[17] It is immaterial that the employees were not seeking formal recognition as a bargaining agent; it was sufficient to constitute a violation of Section 8(b)(7)(A) that they sought to bargain over working conditions. See, *e.g.*, *Dallas Building and Construction Trades Council* v. *National Labor Relations Board*, 396 F. 2d 677 (C.A.D.C.); *Centralia Building and Construction Trades Council* v. *National Labor Relations Board*, 363 F. 2d 699 (C.A.D.C.); *National Packing Company* v. *National Labor Relations Board*, 377 F. 2d 800 (C.A. 10).

[18] Section 8(b)(7)(A) bars picketing only where "a question concerning representation may not appropriately be raised." But the five-year contract between the Union and the Company had been in effect less than 18 months at the time of the picketing here in question, and under the Board's rules the Union's majority status was not subject to challenge during the first three years of that contract. See *Penn-Keystone Realty Corp.*, 191 NLRB 800, 802.



87 Harv. L. Rev. at 663. See *Lane-Coos-Curry-Douglas Counties Bldg. & C.T. Council* v. *National Labor Relations Board*, 415 F. 2d 656, 658–659 (C.A. 9); *Dallas Building and Construction Trades Council* v. *National Labor Relations Board*, 396 F. 2d 677, 680–681 (C.A.D.C.). By seeking to force the Company to bargain separately on two fronts, the discharged employees violated the spirit as well as the letter of Section 8(b)(7)(A).[19]

Section 7 does not protect concerted activities which constitute unfair labor practices under another provision of the Act. See, *e.g.*, *National Packing Company* v. *National Labor Relations Board*, 377 F. 2d 800 (C.A. 10). Cf. *Auto. Workers* v. *Wis. Board*, 336 U.S. 245, 260–263. See, also, Cox, *The Right to Engage in Concerted Activities*, 26 Indiana L. J. 319, 325 (1951). Thus, while the Board in the present case merely determined that the discharged employees' activities were not protected by Section 7 and had no need to decide whether those activities also constituted an unfair labor practice under Section 8(b)(7)(A), the latter provision effectively precludes a contrary interpretation of Section 7. Since the employees' concerted activities here constituted an unfair labor practice under Section 8(b)(7)(A) of the Act, those

[19] Moreover, by insisting that the Company's president, rather than its personnel director, meet with them to discuss working conditions, the dissident employees also violated Section 8(b)(1)(B) of the Act, which makes it unlawful for a labor organization "to restrain or coerce * * * an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances."

activities *a fortiori* were outside the protection of Section 7.

Nor does anything in Title VII change this result, since its protections do not extend to "deliberate, unlawful activity" (*McDonnell Douglas Corp.* v. *Green, supra,* 411 U.S. at 803), or to "activities which run afoul of the law." *Green* v. *McDonnell Douglas Corp.,* 463 F. 2d 337, 341 (C.A. 8), vacated and remanded, 411 U.S. 792. Since the picketing here "ran afoul" of Section 8(b)(7)(A) of the National Labor Relations Act and unlawfully disrupted the collective bargaining scheme established under that Act, it was not protected by the Civil Rights Act of 1964.[20]

[20] Respondent claims that this Court's reference in *McDonnell Douglas* to "unlawful" acts refers only to "criminal conduct and has no legitimate application to the kind of orderly, peaceful conduct in which Hawkins and Hollins engaged" (Br. in Opp., p. 10, n. 6). But whatever basis there may be for extending the protections of Section 704(a) to noncriminal unlawful activity in other contexts, there is no basis for doing so in the context of this case. The orderly process of collective bargaining and the established goals of federal labor policy can be just as disrupted by noncriminal conduct directed toward impermissible objectives as by criminal conduct directed toward permissible objectives. See *National Labor Relations Board* v. *Drivers, Local Union,* 362 U.S. 274, 290–291; *International Brotherhood of Electrical Workers* v. *National Labor Relations Board,* 341 U.S. 694, 703–704. And see our discussion of Section 704(a), *supra,* pp. 30–31.



## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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JUNE 1974.

U.S. GOVERNMENT PRINTING OFFICE: 1974